NO. 56142-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAUL ADGAR,

Appellant,

v.

MARTIN A. DINSMORE and "JANE DOE" DINSMORE, husband and wife, and their marital community composed thereof, and LAKEWOOD WATER DISTRICT,

Respondents.

APPELLANT'S REPLY BRIEF

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A. LWD owed Plaintiff a duty because Bosma's conduct created a high degree of risk of harm to Plaintiff.

LWD argues that Plaintiff must establish a special relationship between LWD and Plaintiff or between LWD and Dinsmore in order for LWD to have a duty to Plaintiff. While a special relationship is one way to establish a duty for a third party's intentional conduct, it is not the only way to establish such a duty. In *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), a case relied upon by LWD, the Supreme Court clearly states that a special relationship is not necessary:

> As comment e to the section explains, a duty to guard against third party conduct may exist where there is a special relationship to the one suffering the harm, ***or "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account."*** RESTATEMENT (SECOND) OF TORTS § 302B cmt. e (1965).

Kim at 196 (emphasis added).

Parrilla v. King County, 138 Wn.App. 427, 157 P.3d 879 (2007) followed *Kim* and applied the duty set out in the

Restatement. In determining whether a duty exists, the Court balances the magnitude of the risk against the utility of the actor's conduct. *Parrilla* at 433-434. In our case, the magnitude of the risk (a serious physical injury from a car crash from a stolen truck) far outweighs the non-existent utility of leaving a truck unattended, with the door open and the engine running on a public right of way. CP 42 (68:10-11); CP 98-99.

While the risk vs. utility balance clearly favors Plaintiff in our case, the *Parrilla* Court provides some factors to consider in analyzing this balance:

> It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence, it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take.

Parrilla at 434-435, quoting Restatement (Second) of Torts § 302 B cmt. f.

> ***The known character, past conduct, and tendencies of the person whose intentional conduct causes the harm.***

Bosma admits that he knew of Dinsmore's "strange" behavior prior to Dinsmore stealing the LWD truck. On the date of the incident, Bosma observed Dinsmore, who appeared to be intoxicated, trying to get into a vehicle, setting off the car alarm and stumbling back from the vehicle after he tried to open the door to the vehicle. CP 178 (66:3-15). On the day prior to the collision, an employee of a soil compaction contractor at the Forrest Road/Rose Road job site was approached by Dinsmore. CP 179-184 (80:4-85:11). Dinsmore offered the worker $50 if he would give Dinsmore a ride to the store to get some more alcohol. CP 183 (84:3-7). The worker declined. CP 183 (84:8-11). That same day, the worker told Bosma about his interaction with Dinsmore. CP 183 (84:15-17). Later that day, Bosma saw Dinsmore walking, apparently returning from the store. CP 183

(84:23-85:4). Bosma thought Dinsmore's encounter with the worker was "strange." CP 184 (85:9-11). LWD argues that prior to Dinsmore nobody had tried to steal a LWD truck in that neighborhood, so Bosma could ignore Dinsmore's "strange" behavior. Not so. Bosma had knowledge of Dinsmore's strange behavior, both on the day of the incident and the day before. This factor weighs in favor of Plaintiff.

The temptation or opportunity which the situation may afford the third party for such misconduct.

Bosma left the LWD truck unattended with the door open and the engine running in the public right of way. CP 42 (68:10-11); CP 98-99. Clearly, this provided Dinsmore with the temptation and easy opportunity to steal the LWD truck. LWD argues that a reasonable person would not assume that the LWD truck would be stolen. Not true. Nearly everyone is taught at an early age to lock your car when you leave it, so it won't get stolen. Shockingly, LWD admits "that is was customary for LWD employees to leave keys in their work vehicle." Brief of

Respondent at 9. Moreover, RCW 46.61.600 requires it: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake thereon…" Bosma's actions provided Dinsmore the easy opportunity to steal the LWD truck. This factor weighs in favor of Plaintiff.

The gravity of the harm which may result.

The harm that can result from a stolen vehicle is catastrophic, as LWD admits. However, this was not just any vehicle, this was a Ford F250 utility truck. LWD argues that Bosma could not have reasonably anticipated that Dinsmore would steal the truck. However, that is irrelevant to this factor. The Court considers the gravity of harm that "may" result. Plaintiff's expert, Daniel Kimbler, a former manager of a water utility district, testified that one reason for properly securing a utility vehicle parked in a right of way is to prevent someone from stealing the vehicle and causing damage to the vehicle or

injuring people. CP 240 (3:1-2). This factor weighs in favor of Plaintiff.

> ***The possibility that some other person will assume the responsibility for preventing the conduct or the harm.***

No person, other than Bosma, was responsible for securing the LWD truck or preventing someone from stealing the LWD truck. Bosma was the only LWD employee at the site and the only person in charge of securing the truck. CP 233. LWD admits that it was a common practice to leave the keys in a work truck in case a different crew member needed to move the truck. However, that is only where the contractor is in control of the entire construction site. CP 113 (66:17-21). The LWD truck was not in a gated, controlled construction site. It was parked in the public right of way, unattended, with the door open and the engine running. LWD's statement that "there was entire work crew in plain sight of the truck working on the water main at the time Dinsmore stole the truck. CP 62 misrepresents the facts. Brief of Respondent at 49. In fact, Bosma was the only LWD

employee on site, and the only other workers on site that were identified were Jeff Tomasovich and Scott Hamilton, employees of a contractor. CP 61 (164:4-9), CP 99, CP 233. To state that "an entire crew" was on site is simply not true. Bosma was the ONLY person responsible for the security of the LWD truck he was driving. This factor weighs in favor of Plaintiff.

The burden of the precautions which the actor would be required to take.

The burden of turning off the engine, removing the keys from the ignition and locking the truck door is minimal. Most people do that instinctively every time they park their car. LWD admits that the burden was "not high." However, LWD goes on to argue that it was customary to leave keys in the vehicle at a jobsite, so other workers could move the vehicle. Again, LWD misrepresents the facts. There was no active construction at the time of the incident; Bosma was there to talk to Mr. Tomasovich about a service "coming up." CP 99 (42:2-6). The only other person identified is Pape and Sons employee, Scott Hamilton.

CP 233. There were only two vehicles (the LWD truck and the Pape and Son's truck) parked on the public right away (not in a construction zone). CP 98-99, CP 233. There is no evidence in the record that Bosma had any expectation that a LWD employee or any other worker at the site might need to move the LWD truck for construction purposes. It is ludicrous for LWD to suggest that leaving the LWD truck unattended, with the door open and the engine running on a public right of way provided any utility whatsoever. This factor weighs in favor of Plaintiff.

Analyzing these factors, it is clear that the risk of Bosma leaving the LWD truck unattended with the door open and engine running is significant, and there is no utility to Bosma's conduct. LWD owed a duty to Plaintiff.

B. LWD's reliance on *Arsnow* and its progeny to support its proximate cause argument is misplaced because Plaintiff was not the person attempting suicide.

LWD argues that because Dinsmore tried to commit suicide that ends the proximate cause analysis, and Plaintiff's claim should be dismissed. LWD relies on *Arsnow v. Red Top*

Cab Co., 159 Wash. 137, 292 Pac. 436 (1930) and its progeny for support. However, these cases are inapplicable to our case because nobody is accusing LWD of causing Dinsmore to commit suicide and Plaintiff was not the one who attempted suicide.

In all of the cases cited by LWD (both Washington cases and out of state cases) the claim is being brought by the person who committed suicide (or that person's estate). In our case, Plaintiff is not the person who attempted suicide. Dinsmore attempted suicide. This is significant because, unlike the decedents in *Arsnow* and its progeny, Plaintiff was a fault-free victim.

Also, in the cases relied upon by LWD, the estate of the decedent is claiming that the Defendant acted negligently to cause the decedent to commit suicide. In *Arsnow*, the Plaintiff was injured in a car crash caused by Defendant. The Plaintiff eventually committed suicide and his estate claimed that the Defendant was responsible for the Plaintiff's suicide because

the injuries from the car crash caused the Plaintiff to commit suicide. *Arsnow* at 138-139. In *Arsnow* and all of the other cases relied upon by LWD, the intentional, suicidal act was that of the claimants themselves (or their estates). In our case, Plaintiff's state of mind and conduct are not at issue. The courts in those cases were reluctant to assign liability to a defendant for allegedly causing a person to commit suicide. In our case, nobody is accusing LWD of causing Dinsmore to attempt suicide.

In *Arsnow*, the court's holding is limited to claims for wrongful death claims, "we are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse." *Arsnow* at 152. In *Webstad v. Stortini*, 83 Wn.App. 857, 924 P.2d 940 (1996), the court's holding was even more limited:

> We decline to impose a legal duty to immediately summon aid whenever a person has reason to suspect that another person may be attempting suicide. Susan Webstad created the risk of her own

> injury and the necessity that she rely on others to save her.

Webstad at 875-876.

The limited holdings in *Arsnow*, and *Webstad* are for wrongful death cases brought by the decedent's estate, where the decedent committed suicide. Plaintiff is not claiming that LWD caused Dinsmore to commit (or attempt to commit) suicide. These cases are inapplicable to our case.

C. The appropriate test for proximate cause in our case is Restatement (Second) of Torts § 442 – whether the harm caused Plaintiff was within the scope of risk created by Bosma.

LWD agrees with Plaintiff that Restatement (Second) of Torts § 442 is controlling. However, LWD argues that Dinsmore's suicide attempt was not a foreseeable consequence of Bosma's decision to abandon a LWD truck in the right of way of a residential area with the engine running. Brief of Respondent at 30. LWD argues, "The harm that could have resulted from the theft of a vehicle is a different type of harm than the harm that results from intentionally accelerating and driving directly into an

approaching vehicle was extraordinary." Brief of Respondent at 31. Not true. Physical injuries from a motor vehicle collision is precisely the type of harm that can be caused by car thief fleeing the scene of the theft.

LWD further argues that most car thefts do not end in attempted suicides and that LWD did not cause Dinsmore to commit suicide. Brief of Respondent at 31. LWD's argument erroneously focuses on Dinsmore's specific conduct. The Court does not focus on the specific conduct of the third-party actor; the Court focuses on the type of harm that results and the risk created by a defendant, even when the intervening act is intention:

> *[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct.*

West v. Ride the Ducks Int'l, LLC, 2021 Wash. App. LEXIS 1622, Case No. 80257-7-I (unpublished July 6, 2021) at 36-37, citing

Restatement (Second) of Torts Section 442, Comment b (emphasis in original)[1].

West follows *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 24 (1978) and *Campbell v. ITE Imperial Corp*., 107 Wn.2d 807, 733 P.2d 969 (1987). LWD fails to even address *West* or *Herberg*, and merely mentions the factors set out in *Campbell*. Under Restatement (Second) of Torts § 442, Comment b, Dinsmore's conduct was not a superseding act.

First, the harm caused by Dinsmore (physical injuries to another) is foreseeable when a person abandons a truck in a public right of way, with the door open and the engine running. The General Manager of LWD, Randall Black, testified that prior to this incident the practice for LWD workers was to turn the engine off, take the keys and lock the doors when the vehicle was left unattended and out of the driver's sight. CP 210 (11:6-9). Immediately after this incident, Mr. Randall issued the following memo: "**Effective immediately, keys to District vehicles are**

[1] Unpublished opinions in the Court of Appeals filed after March 13, 2013 may be cited as non-binding authorities. RAP 10.4(h); GR 14.1(a).

not to be left in the vehicle unattended. Further, no District vehicle is to be left running unattended." CP 215 (emphasis added). Plaintiff's expert witness, Daniel Kimbler, a former manager of a water utility district, opines that one reason for properly securing a utility vehicle parked in a right of way is to prevent someone from stealing the vehicle and causing damage to the vehicle or injuring people. CP 240 (3:1-2).

Second, Bosma created or increased the recognizable risk by abandoning the LWD truck in a public right of way with the door open and the engine running. Had Bosma turned off the ignition and locked the truck, Dinsmore would not have been able to steal the truck and crash the truck into Plaintiff's vehicle while fleeing the scene.

Third, this Court does not consider "how [the harm] is brought about" when the harm is within the scope of risk created by Bosma: when the harm is foreseeable, the defendant's conduct is always proximate, except where there is such intentionally tortious or criminal intervention, ***and*** it is not within

the scope of the risk created by the original negligent conduct. Of course, Bosma did not expect Dinsmore to try to commit suicide after stealing the truck. That is not the test. The final act that brought about the harm is not the test. The test is whether the harm (physical injury from a car crash) is foreseeable and whether the third party's intentional act (Dinsmore's stealing the car and crashing the car) is within the scope of risk created by the defendant. By abandoning the LWD truck with the door open and the engine running on a public right of way, Bosma created the risk that someone would steal the truck and cause a car crash.

The Court also adopted Restatement (Second) of Torts § 449, which is instructive:

> Under § 449, even criminal conduct of a third party does not constitute a superseding cause "[i]f the likelihood that a third person may act in a particular manner is . . . one of the hazards which makes the actor negligent."

Campbell at 815.

One of the hazards of Bosma's leaving the LWD truck in a public right of way, unattended with the door open and the engine

running is that a person may steal the truck and crash it into another vehicle. *See* CP 240 (3:1-2) (Daniel Kimbler testimony). While *Parrilla v. King County* analyzed the element of duty, it is also instructive in the proximate cause context. The *Parrilla* Court found that one of the hazards in leaving a bus unattended with the engine running is that a person may steal it and crash the bus into other vehicles. *Parrilla* at 440.

LWD also fails to address *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 951 P.2d 749 (1996). In *Schooley*, a store owner sold beer to a minor without asking for identification. *Id*. at 472. The minor shared the beer with another minor, who got drunk and dove into a shallow swimming pool, fracturing her spinal cord. *Id.* The trial court dismissed the action on summary judgment. *Id*. The Court of Appeals reversed, and the Supreme Court upheld the Court of Appeals' reversal. *Id*. at 473, 483.

The *Schooley* Court rejected the store's argument finding legal causation when another commits a criminal act would lead to unlimited liability. *Id.* at 481. The Court found that when

minors consume alcohol, the alcohol is often shared with other minors, so it is foreseeable that when a vendor sells alcohol to a minor, the minor will share the alcohol with other minors. *Id*. at 483. The Court did not find that the injured minor's specific act of diving into a shallow pool would be contemplated by the store clerk who sold alcohol to minor. Like *Campbell* and *West*, it is the scope of risk of harm created by the store clerk's negligent act that is relevant, not the predictability of the specific acts that led to the harm.

Even if this Court finds that Dinsmore intentionally tried to commit suicide, the harm to the Plaintiff is within the scope of the risk created by the LWD's negligent conduct. *See Campbell*; *West*; Restatement (Second) of Torts 449. LWD's negligent conduct was leaving a LWD truck unattended, with the door open and the engine running in the public right of way. The scope of risk of harm created by LWD's negligent conduct clearly includes that a person would steal the truck and cause another person injuries resulting from a collision with the truck.

II. CONCLUSION

LWD owed a duty to Plaintiff because the magnitude of the risk of harm of Bosma's leaving the LWD truck on a public right of way unattended, with the door open and engine running outweighed against the utility of his conduct. Bosma's actions proximately caused Plaintiff's injuries because the harm was within the scope of risk created by his actions. This Court should reverse the trial court's decision granting LWD's motion for summary judgment.

This document contains 3225 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of June, 2022.

MORGAN & KOONTZ, PLLC

By: _____
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

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DATED this 30th day of June 2022, at Port Orchard, Washington.

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